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IN THE

Supreme Court of The United States

OCTOBER TERM, 1975

NO. 75-1638

HORACE KELL, ET AL.,
Appellants,
v.

NICK P. CHILIVIS, ET AL.,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF GEORGIA

MOTION TO DISMISS

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Ga. Code § 92-5702

IN THE
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Appellees.

ON APPEAL FROM THE SUPREME
COURT OF GEORGIA

MOTION TO DISMISS

The appellees move to dismiss the above-styled appeal on the grounds that: (1) The federal questions sought to be reviewed were not timely or properly raised before the Supreme Court of Georgia; (2) The issues raised in the appellants' jurisdictional statement do not present a substantial federal question; and (3) The decision of the Georgia Supreme Court rested on adequate nonfederal grounds.

STATEMENT OF THE CASE

The appellants are all taxpayers residing or owning property in Douglas County, Georgia. The Board of Tax Assessors for Douglas County, in examining returns of these taxpayers, determined that the

property of the appellants was not returned at a fair and just valuation and changed the returned values of the appellants' property.

As a result of this increase in the valuation of the appellants' property, the appellants, in lieu of following the statutory process authorizing judicial review of any such increase, brought an action for an injunction and declaratory judgment in the Superior Court of Douglas County.

The appellants' complaint, which was amended twice, basically concentrated on the uniformity, or the lack thereof, of valuations placed on the property of taxpayers both within Douglas County and throughout the State of Georgia.

In the original complaint, and in the prayer for relief, the appellants asked that certain statutes be held violative of the "U.S. Constitution". Nowhere in the original complaint was there any specific reference to any particular portion of the United States Constitution which was alleged to have been violated. In the first amendment to the complaint, no reference to any violation of any part of the United States Constitution was made.

In the second amendment, the appellants made reference to an alleged violation of the U.S. Constitution, specifically asserting that the term "fair market value," the basic value upon which all

property taxation in the State of Georgia rests, was so vague and indefinite that its utilization deprived the appellants of their property without due process of law. The appellants then asserted that if the statutes attacked were not unconstitutional because of the utilization of the term "fair market value", that these same statutes were unconstitutional because the method of determining and computing the "fair market value" of the appellants' real property was different from the method of computing the "fair market value" of both the personal property of other taxpayers and the property, both real and personal, owned by railroads and public utilities in the county and the State. Finally, in the same amendment, the appellants urged that the utilization by the Georgia State Revenue Commissioner of a study made by the Georgia State auditor (for purposes unrelated to property taxation) as a tool in equalizing evaluations of property violated appellants' constitutional rights under the Fourteenth Amendment to the United States Constitution.

The decision of the superior court was adverse in parts to both the appellants and the appellees and appeals were taken by both.

The appellants, pursuant to the requirements of State law, and in order to perfect their appeal, filed an enumeration of errors in the Supreme Court of Georgia setting forth 18 grounds which were alleged to provide the basis for

reversing the superior court, none of which specifically alleged a violation of the United States Constitution.

The decision of the Supreme Court of Georgia identified and passed upon two constitutional issues, one which had been raised in the original complaint as amended and one which the court raised on its own. The court held first that the use of the phrase "fair market value", which had been attacked by the appellants, was not unconstitutional and second, that individual taxpayers could not challenge the uniformity of assessments of property between their county and other counties in Georgia and that this prohibition did not violate the taxpayers' rights under the U.S. Constitution. Importantly, the Supreme Court of Georgia only considered these issues after holding that the appellants had an adequate remedy at law, which would be dispositive of the case.

Thereafter, the appellants filed a motion for rehearing and for the first time actually asserted that each of the statutes and practices attacked violated rights protected by the Fourteenth Amendment to the Constitution of the United States. The Supreme Court of Georgia summarily denied the motion for rehearing without opinion.

It is from this final decision that the appeal to this Court has been taken.

ARGUMENT

1. THIS CASE IS NOT WITHIN THE JURISDICTION OF THE SUPREME COURT BECAUSE THE STATE COURT DECISION RESTED ON AN ADEQUATE NONFEDERAL GROUND.

A basic factor in determining whether this Court should review a decision issued by the highest court of a particular state is whether the state court judgment is based on an adequate and independent nonfederal ground. If it is, this Court has determined that the judgment is not reviewable even though a federal question may be involved, and even through the federal question may have been wrongly decided. See Herb v. Pitcairn, 324 U.S. 117 (1945).

The decision which the appellants seek to have this Court review in fact clearly rests on an adequate nonfederal ground. Before considering any other issues, the Supreme Court of Georgia, in Division 1 of its opinion, concluded that the appellants had recourse to the Douglas County Board of Equalization, and that this forum could and would provide the appellants with an adequate and appropriate remedy at law. As a result, the Supreme Court of Georgia specifically held that the appellants were not entitled to an injunction.

The Supreme Court of Georgia proceeded to consider the other issues

raised by the appellants, but it is plain that the consideration of these issues by the court, or, conversely, the failure of the court to consider these issues, could not have changed the outcome of the case. The case was decided in the first division of the opinion, when the court held that injunctive relief was not proper in the matter.

Language supporting this conclusion is found in another recent decision of the Supreme Court of Georgia. In Chilivis v. Backus, 236 Ga. 88, 222 S.E.2d 371 (1976), the Supreme Court of Georgia considered a similar appeal and reached a similar conclusion. In Chilivis v. Backus, supra, the court held that the taxpayers, who had sought, as in the matter at bar, both injunctive and declaratory relief, had an adequate and complete remedy at law before the county board of equalization, and, more importantly with respect to the issues which are presently before this Court, the Supreme Court of Georgia concluded that the other matters raised by the appellants in the case,

> " . . . should be litigated in the appeals to the county board of equalization." Id. at 90.

Thus, and irrespective of the decision of the Georgia Supreme Court with respect to any federal question presented, the court intended to and did deny relief

to the appellants because they had failed to proceed in the proper forum utilizing the statutory procedures which the Supreme Court of Georgia has recognized as providing adequate and appropriate relief to persons in the same legal position as the appellants.

2. WITH ONLY TWO ARGUABLE EXCEPTIONS, THE APPELLANTS FAILED TO RAISE IN A TIMELY MANNER THE FEDERAL QUESTIONS WHICH HAVE BEEN ASSERTED IN THEIR JURISDICTIONAL STATEMENT.

The only attacks upon the constitutional validity of a State statute which appellants raised at all, prior to their motion for rehearing, involved: (1) Whether the phrase "fair market value" used in the basic State tax statutes is so vague and indefinite as to deprive appellants of their property without due process of law; (2) Whether the utilization of different formulae to determine "fair market value" for different property is a violation of the Fourteenth Amendment to the Constitution of the United States; and (3) Whether the State Revenue Commissioner's utilization of a "ratio study" as a tool to check the accuracy of property valuations in a particular county deprives appellants of their property without due process of law.

The Supreme Court of Georgia, in its decision, acknowledged and decided the issue involving the phrase "fair market value" on constitutional grounds

but did not find it necessary to rule on the rest of the issues raised by the appellants, a result which bars review by this Court. See Whitney v. California, 274 U.S. 357 (1927). In addition to the "fair market value" issue, the Supreme Court of Georgia on its own raised and decided one additional constitutional issue; the Supreme Court concluded that the representatives of the individual taxpayers, the counties, have standing to challenge the equality and uniformity of taxes between counties, but that individual taxpayers do not, and that this is not violative of the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution. All of appellants' other constitutional issues were raised only after the Supreme Court of Georgia's initial decision was reached.

Therefore, only these two questions, involving the utilization of the phrase "fair market value", and the conclusion that individual taxpayers did not have standing to challenge the uniformity of taxes between political subdivisions of the State, were properly raised before and considered by the Supreme Court of Georgia. As this Court has held numerous times, raising a federal question for the first time in a petition for rehearing addressed to the highest State court is insufficient unless the court actually entertained the petition and expressly decided the question. See Radio Station WOW, Inc. v. Johnson, 326 U.S. 120 (1945); Hansen v. Denckla, 357 U.S. 235 (1958); Herndon v. Georgia, 295 U.S. 441 (1935);

American Surety Co. v. Baldwin, 287 U.S. 156 (1932); and Forbes v. State Council, 216 U.S. 396 (1910).

Here, the Supreme Court of Georgia summarily denied the motion for rehearing without opinion and thus the appellants cannot bring themselves within the exception to the general rule stated above. The federal questions raised for the first time in the petition for rehearing have not been timely or properly raised. Therefore, all of the federal questions asserted by the appellants, with the exception of the two noted above, should be dismissed because the appellants did not timely or properly raise them.

3. THE ISSUE OF WHETHER THE PHRASE "FAIR MARKET VALUE" IS SO VAGUE AND INDEFINITE AS TO VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

Georgia Code § 92-5702, one of the Code sections attacked by the appellants, defines the phrase "fair market value", which establishes the basis for all property taxation in the State of Georgia. That statute provides that:

> "The intent and purpose of the tax laws of this State are to have all property and subjects of taxation returned at the value which would be realized therefrom by cash sale, as such property and subjects are usually

> sold, but not by force sale thereof, and the words 'fair market value,' when used in the tax laws, shall be held and deemed to mean what the property and subjects would bring at cash sale when sold in the manner in which such property and subjects are usually sold."

The appellants' complaint is evidently not with the language of the definition, which is clearly specific, but rather arises because the appellants assert that persons might differ as to what the fair market value of any particular piece of property might be. The appellants' complaint arises from the fact that there is evidently no assurance that reasonable men could sit down and agree, without dissent, that a particular amount represented the true market value of a piece of property, that is, could determine what price that an actual purchaser would be willing to pay the owner of a piece of property.

However, this Court has never held that "fair market value" must be defined with that degree of specificity. The question of determining value for the purposes of taxation has been clearly and fully discussed by this Court and the issue is well settled and needs no further review. This Court has said that the principles governing the ascertainment of value for the purposes of taxation are the same as those that control in condemnation cases, confiscation cases and

generally in controversies involving the ascertainment of just compensation. See Great Northern Railway Company v. Weeks, 297 U.S. 135 (1936); West v. Chesapeake and Potomac Telephone Co., 295 U.S. 662 (1935) and Olson v. United States, 292 U.S. 246 (1934). In making an assessment, this Court has clearly stated that assessors are free to consider all pertinent facts, estimates and forecasts and to give each of these factors such weight as they may be reasonably deemed to have in reaching such a determination. Great Northern Railway Company v. Weeks, supra.

Therefore, the appellants' assertion that the phrase "fair market value" is so vague and indefinite as to violate the due process clause of the Fourteenth Amendment, fails to present a substantial federal question.

4. THE DECISION OF THE SUPREME COURT OF GEORGIA, THAT INDIVIDUAL TAXPAYERS DO NOT HAVE STANDING TO CHALLENGE THE UNIFORMITY OF VALUATIONS ON PROPERTY AS BETWEEN POLITICAL SUBDIVISIONS OF THE STATE, DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

In its decision, the Supreme Court of Georgia at the behest of the State Revenue Commissioner, reviewed the lower court's injunction which prohibited the collection of a State property tax in Douglas County. The superior court had enjoined the collection of that tax based

on the fact the property valuations in counties surrounding Douglas County, were lower than those in Douglas County. The injunction was based on an alleged violation of a provision of the Georgia Constitution regarding uniformity, and not on the basis of any violation of the federal constitution.

Nonetheless, the Georgia Supreme Court at least peripherally raised the question of possible violation of the Fourteenth Amendment by referring to its earlier decision in Griggs v. Greene, 230 Ga. 257, 197 S.E.2d 116 (1973), in which the Georgia Supreme Court had held that there was no violation of the due process and equal protection provisions of the Federal Constitution merely because the statutes which allowed the State Revenue Commissioner to equalize valuations between counties by raising the valuations in any particular county, did not provide for notice and an opportunity to be heard to individual taxpayers in the counties in which the adjustments were made. The Supreme Court in its decision which is now being challenged, noted that to allow individual taxpayers in each of the 159 counties of Georgia to challenge the factual decision of the State Revenue Commissioner in equalizing as far as practicable the values of property subject to taxation in the State, would result in a chaotic situation. The Supreme Court held that while the State Revenue Commissioner has the duty to equalize the digest between the various counties, if objection is made to the exercise of the discretion of the State

Revenue Commissioner in equalizing the digests, it must come from the county and not from the individual taxpayers particularly since the State Revenue Commissioner has no authority to vary individual valuations, but rather simply "factors" the entire digest.

The appellants' challenge to this conclusion does not raise a substantial federal question, because the issue has previously been considered by this Court in Bi-Metallic Investment Co. v. State Board, 239 U.S. 441 (1915), and decided adversely to the appellants. In that case, the valuation of property in Denver, Colorado, had been raised forty percent by the State tax authorities and no provision was made for either the City of Denver or for the individual taxpayers in Denver to appeal the increase. In that case, Mr. Justice Holmes, speaking for the court, said:

> "The question . . . is whether all individuals have a constitutional right to be heard before a matter can be decided in which all are equally concerned - here, for instance, before a superior board decides that the local taxing officers have adopted a system of undervaluation throughout a country, as notoriously often has been the case. The answer of this court in the State Railroad Tax Cases, 92 U.S. 575, at least as to any further notice, was that it was hard to believe that the proposition was seriously made.
>
> Where a rule of conduct applies to more than a few people, it is

> impracticable that everyone should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meetings or in assembly of the whole." Id. at 445.

The Court suggested that the rights of the individual are protected by their power over those who make the rule. It is not necessary to go to such an abstract length in the matter at bar. While the Supreme Court of Georgia has barred individuals from attacking the State Revenue Commissioner's factual decisions, the counties clearly have the authority to do so. Thus, the individual taxpayers are given an opportunity to have their interest protected through the exercise of this right by the political subdivision of which they are a part.

Therefore, the decision of the Supreme Court of Georgia that individual taxpayers do not have the right to challenge the State Revenue Commissioner's factual determinations as to the uniformity of valuations throughout the State, is supported by Bi-Metallic Investment Co. v. State Board, supra, and there is no substantial federal question presented.

CONCLUSION

It is clear that the issues sought to be presented to this Court do not warrant review. The decision of the Supreme Court of Georgia clearly rested on an adequate nonfederal ground, but even if it had not, the questions presented by the appellants were neither properly raised nor substantial.

Wherefore, for the foregoing reasons the appellees respectfully request that this Court grant the appellees' motion to dismiss the appellants' appeal.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, H. Perry Michael, one of the attorneys for Appellees herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that I have this day served each party in this action with three copies of the foregoing Motion to Dismiss by depositing three copies of the same in the United States mail, with first class postage prepaid, addressed as follows:

Cecil D. Franklin
Post Office Box 269
Rockmart, Georgia 30153

This _____ day of September, 1976.

_____
H. PERRY MICHAEL, Senior
Assistant Attorney General